# NO COMBINATION WITHOUT REGULATION

By Talcott Williams, LL.D.,
Philadelphia.

To the succinct statement of the law by Judge Hough, it is unnecessary to add, and it is impossible to controvert. His two broad propositions sum past law and future action—constitutional power exists to discharge effectively any duty entrusted to the Federal Government, and the duty of regulating commerce with foreign nations and between the states will in the end bring the government to the supervision of all the instruments of that commerce, including corporations engaged in this commerce, because without this the first duty would not be fully and effectively discharged. A railroad corporation is regulated by the Federal Government, primarily not because it is engaged in interstate commerce, but because the regulation of interstate commerce is the national duty of Congress. It is not the relation of the railroad to this commerce which brings into action the Federal Government; but the relation of the Federal Government to interstate commerce which brings the railroad under federal regulation. Any other corporation which enters interstate commerce to an extent which renders its regulation necessary to the regulation of interstate commerce will for the same reason come under the scope and sweep of federal power.

In the early stages of the judicial application of this principle, it was inevitable that attention should be concentrated on the extent to which a corporation, railroad or other, entered into interstate commerce; but as federal regulation of interstate commerce grows and extends, becomes more minute and pervasive, the question shifts to the constitutional necessity of the regulation of a particular corporation or a particular scrutiny of the area under consideration in order to make complete the regulation of interstate commerce by Congress. The courts in delimiting the boundaries of federal power always begin by asking whether it is necessary to regulate this person, office, act, corporation or function; but they always end by asking is it necessary to a complete regulation to

include this person, office, act, corporation or function. Their earlier decisions by a natural evolution exclude. Their later decisions include. Their attention is early drawn to the new object on which federal power in its first exercises impinges. Their later attention is concentrated on the central subject of the exercise of federal power, and while the area of this power cannot and is not changed by the courts as they define its boundaries, much which early seemed to lie under state sovereignty and was under state supervision, passes later under an active federal jurisdiction, whose authority always existed but whose boundaries can only appear as it is exercised. This normal process and growth in the exercise—not at all in the immutable substance of federal power—has taken place in many fields. Witness the manner in which the exercise of that share of the police power needed for the protection of the mails and the protection of the community through which the mails pass has grown in its statutory expression and judicial interpretation. Offenses were early left to the punishment of state law. States claimed and sometimes exercised the right to protect the social and municipal rights of the community by a local censorship of the mails. The Federal Government, by statute and decision, more sharply defined the boundaries of its power. They extended over much early and loosely left to the state. At length, in the lottery cases, the Federal Government suppresses by a criminal statute the manufacture of lottery tickets within a state because these tickets could be used only by entering interstate commerce, and the federal discharge of the duty of carrying the mails could only be fully and freely exercised by protecting the mails from injuring the moral standards and well-being of the community. It was a good lawyer and sound thinker, the late J. Randolph Tucker, who as attorney-general of Virginia, held that the state could exclude seditious and inflammatory publications from the federal mails, and the half century from his opinion, which no one can read without appreciating its force, to Associate Justice Brewer's decision in the lottery ticket cases, marks, not a change in federal power, constitutionally unaltered in the interval, but in the development in exercise and interpretation of the power conferred on Congress to establish a post office and post roads.

A precisely similar change, in which fragmentary statutes and decisions intent on the reasons for excluding objects apparently com-

ing within the range of federal statutes, episodical and non-systematic, are succeeded by systematic legislation and embracing inclusive decisions, has taken place in pilotage, immigration and quarantine. It is impending in the relation forests bear to navigable streams. Forest, source, stream, bed and water are each and all indubitably under the sovereignty of the state. Prove that the navigation of the stream cannot be fully and freely regulated without their control and all these things, ancillary to the stream, will pass under federal ownership, jurisdiction and regulation, as a tract of the soil of the sovereign State of Pennsylvania, one of the original thirteen, never under federal control or ownership, could be condemned for national uses, when it had been consecrated to national needs by becoming the site of the Battle of Gettysburg.

This broad and continuous evolution in federal statute and decision which has gone on for a century and a quarter, which always follows the same law, takes the same course and reaches the same terminus and conclusion in the end, finding a boundary in a federal constitutional purpose, instead of a purpose in the boundaries of state power, is a safer guide and more sure than narrow deductions from individual cases. It is not that the supreme court changes its position. The position from which the court views the subject changes with the march of events and the stream of constitutional practice which brawled over obstacles in its early torrent flow, broadens and widens into the serene stream which carries unchallenged the exercise of federal power as it reaches the common ocean over which only this jurisdiction extends.

We may be certain that what has been will be, and in the end, the power to regulate commerce between states (so long left dubious and fragmentary) will in due time include under its regulation the entire body of corporate existence whose presence so perturbs the course of this commerce as to perturb federal regulation. When this is clear, the federal regulation of such corporations will come because the court will be considering not the share of these corporations in such commerce large or small, but an effective regulation by the central government and the steps needed for this. In the end the ox-hide of federal power is always cut into strips when the permanent boundary comes to be made.

This deep and assured conviction that Congress would finally legislate upon the great corporations and combinations, I found

pervaded the conference on trusts called at Chicago in the last week of October by the National Civic Federation, to my connection with which I owe my presence on this platform,[1] attending it as I did as a delegate from this state appointed by the governor. Possessing no substantive powers and in none of the customary and organic senses of the word representative, it included delegates appointed by the chief executive of most of the states in the Union interested in the subject, state officers and the counsel of the federal government engaged in the regulation of railroads and the prosecution of trusts, the counsel of many of the larger railroads and corporations, and delegates from the trade combinations, like the National Druggists' Association and labor unions, including the American Federation of Labor and various farmers' organizations. Such a body represents without being representative. Such a body, having no legislative responsibility and no party responsibility, met for opinion and not for action, is, as every journalist comes to know, a better gauge of public sentiment at any given moment than bodies of real power and actual importance. Having to act, these latter and their members must be careful of expression; but a conference like that which met in Chicago reflects and mirrors with great accuracy the average and widespread opinion of the day, before it crystallizes into law, when all can see the record and expression of authoritative public opinion finally expressed in statutory form.

No one could be a member of this body, meet its membership, share its deliberations and share in the work of securing an unanimous expression of opinion from its diverse membership, without securing an invaluable impression of floating opinion. Such a conference, if its members come to a common opinion, expresses exactly and accurately what people would like to have, before the bulky, cumbrous and official action of national parties and the national legislature has acted and enacted law.

The Chicago Conference on Combinations and Trusts of the National Civic Federation made perfectly clear what I believe is the settled purpose and resolution of the American people, that there shall be no combination without regulation. The decision of the Supreme Court on the boycott in the Danbury hat case has put this popular resolution into judicial form, and the support and approval

[1]This paper is a revision and enlargement of an address delivered at the Annual Meeting of the Academy, April 11, 1908.—EDITOR.

given this decision and the widespread opposition to any proposed legislation modifying or seeming to modify this decision shows how near it is to public conviction. Whether in capital or labor, whether in railroads or industrial corporations, whether in distributing agencies, trade associations like the druggists' or farmers' associations, combination without regulation will not be permitted by the American people. Combination, to any size, any extent and any purpose not prohibited by law, the American will accept. The mere size of anything never daunts him. He is used to big things. But combination which is not regulated he will not permit. The real choice is not whether there shall be regulation or not; but whether this regulation shall be by and through a criminal statute, the Sherman Anti-Trust Act of 1890, or through administrative regulation and supervision. The whole body of combinations, railroad and industrial, of labor and of farmer, of wholesaler and retailer, have no choice between regulation or not; but between the drastic operation of the criminal courts through this federal law and similar state statutes or reports to and supervision by orderly civil machinery. One or the other there will be, because combination without regulation our people and public will not permit.

In English jurisprudence, a directly opposite movement has been in progress. In this country, twenty-three years ago the New York Court of Appeals by its decision on the Sugar Trust, broke up a system begun for the combination and consolidation of corporations in Ohio a score of years earlier. This decision has been accepted as law in almost every state. Legislation followed under the attention directed to the subject by a decision which left no course open but the corporation directly owning the consolidated properties in any new combination. The "holding corporation" remained a convenient screen until its standing was left in doubt by the decision of the Supreme Court in the Northern Securities case. In interstate commerce it remains secure to-day, only on evidence showing that it was not intended to end any competition. A similar conclusion would probably be reached by most state courts of last resort. The act of 1890, the Sherman Anti-Trust Act, is but one of a network of legislation covering all our states. Of varying character these laws and the decisions and prosecutions over them have extended, as already shown, to every branch of trade. Little of what the common law permitted in combination in restraint of

trade is left. How much even this was, the wise man will not too strictly define. What the cankerworm of federal law and its interpretation and administration has not destroyed, the caterpillar in the branching tree of state jurisdiction has eaten. If a combination in restraint of trade lives at peace in this country, it is not without apprehension, and those called to a close acquaintance with the managers and the counsel of our great combinations in industry and transportation, know best their manifold anxiety. I speak with knowledge when I record that in the past five years, the great and most conspicuous corporations in both fields, in and out of interstate commerce, have been solemnly advised that past decisions, state and federal, have only to be pushed to their full legitimate logical conclusion to challenge the security of any corporate combination from the United States Steel Corporation and the Pennsylvania Railroad down. No such "badge of sufferance" has ever been imposed by law on capital in modern history since the Jew was baited from York to Venice, by Plantagenet and Doge alike. Not in our history has there been on any subject of mingled moral and economic, social and legal relations such general unanimous and universal exercise of the law-making, judicial and law-enforcing power since the legislation from 1820 to 1860 on chattel slavery, and this was divided into two opposing purposes—North and South. The national resolution that there shall be no combination without regulation enters every state, controls federal laws, decisions and prosecutions for eighteen years.

In the very same period England has been relieving combinations of every order, even from the regulation familiar in the past under the common law. The sweeping doctrine laid down in the case of the Mogul S. S. Co. *vs.* McGregor (1892, A. C. 45 and 23 Q. B. D. 598), at the same time as the passage of the Sherman Act, controls English courts. When a court of last resort can, as in this case, reach the conclusion that a group of common carriers trading on the high seas can agree to refuse all freight from a shipper who sends any goods by a ship carrying freight at less than the rates agreed upon by the combination, any agreement in restraint of trade is possible. The reasoning in this decision distinctly reaches the conclusion that in trade, agreements cannot be divided and discriminated. All must be accepted alike as long as the end is directed to an increase and promotion of trade. As long as the trade itself is

justifiable, any combination to increase traffic is permissible. In dealing with Trade Unions, the English courts had reached a similar view in Allen *vs.* Flood (1898, A. C. 1), practically establishing the rule that neither the officers nor the members, neither the society nor its funds were responsible for acts injurious to a third party. As soon as this was modified in Quinn *vs.* Leathem, House of Lords, August 6, 1901, with reference to crimes on an appeal from an Irish jurisdiction and for civil damages by the Taff Vale case (Taff Vale Railway Company *vs.* Amalgamated Society of Railway servants *et al.*), in 1901, a steady agitation followed, which has ended in legislation, both political parties agreeing, which the House of Lords accepted, its law lords vainly protesting.

On most subjects, as every one knows, the broad currents of English and American law, flowing from the same fountains, flow in separate channels but to the same purpose and intent. On most points of principles the courts agree and statutory assimilation is more frequent and constant than most realize. Each system is constantly borrowing from the other. But in the past twenty-five years, in which this precise issue has loomed large on the horizon of modern trade, English courts and legislation have reduced or removed altogether common law restrictions and American courts and legislation have increased them. In England, any trade or labor combination is to-day permissible, and the decisions in regard to common carriers by no means enforce impartiality to all, unless required by statute. In this country, the suppression of combination grows more and more drastic. As every one knows, combinations accepted without challenge thirty years ago are to-day not only penal by statute, but the courts in construing these statutes have matched mediæval tribunals in dealing with the forestaller and regrater.

It is a matter of common knowledge, that in the period of development in railroads, industries and distribution after the Civil War, from 1865 to 1881, when the first agitation began, railroads, without challenge, granted rebates, discriminated in rates, agreed on rate sheets and pooled their receipts, manufacturers combined on prices and divided territory, wholesalers and retailers united to preserve the margin between wholesale and retail prices and refused goods to those who broke scheduled prices. These were all openly and publicly done for a score of years. These acts and this policy

were accepted by the public. The records of more than one of our great corporations will show that counsel advised that these practices were legal. At least one railroad, a party to the notorious contract on oil freights with the Southern Improvement Company, was advised by its solicitor on that contract that it had a right to sell its transportation at different rates to different customers as freely "as a grocer sells sugar at different prices." The whole range of methods now condemned and prosecuted was accepted without interference by courts or legislatures for years. One reason for the extreme bitterness among capitalists over sixty years of age is that they find themselves pilloried and prosecuted for acts once the accepted path to railroad profits and business success. The prospect that the United States would reach the conclusion and conviction on all these issues, to-day established in English law was, up to thirty years ago, stronger in this country than in England.

If the two lands have divided on this vital social issue, the reasons rest on their social fundamental organization. Combination has been accepted without regulation in England because the entire English social system is a series of closed groups. The peerage itself constitutes one such body enjoying special legal privileges descending by the same law as realty inheritance. The church as by law established enjoys exclusive non-competitive privileges unknown to the religious life of Americans. Public education, even when supported by taxation, passes under the control of religious bodies in England, associated for this purpose and jealously excluding interference to an extent alien to all our conceptions of the common school, whose essence is its freedom from any control by individual combination. The English union enjoys a power, excludes non-union competition and is accepted by the public and the law as a combination having rights of monopoly control to an extent unknown in the United States.

Combinations, without regulation, special monopolies of privileges, legislative, ecclesiastical, in education, in industry and in labor, exist at many points in the English social organization. This is none the less true because in certain specific instances, as the American Tobacco Trust, the retailers' privileges were defended by the public. The retailer is himself organized in a closed group in England, socially and economically. His discounts are protected, where here, in a series of decisions, the retailer's right to protec-

tion from cut-rate competition and the wholesaler's power and policy to furnish this protection have been swept aside by federal and state courts.

English society is stratified and cellular, full of "ductless glands," if I may borrow a physiological simile whose play and working are of the utmost value to the body politic. What is royalty itself but just such a ductless gland developed and inherited through a long period, surviving all changes and discharging a special function indispensable to the healthy working of the British organism.

Our American social organization knows none of these things. It has no place in all its system for any closed group. It is jealous of them. Any combination which assumes to be superior to regulation arouses an instant antagonism. Having traveled even farther than England along the path of organized combination, with the prescient, prophetic, penetrating wisdom of a democracy, the American people suddenly halted a little over a score of years ago. Agitation and investigation laid bare the tendencies towards combination. Through all its agencies, state and federal, and through every power and function known to these twin agencies, legislative, executive and judicial, there has been a sudden reversal of earlier acquiescence and instead prosecutions, which ran to the boundary of persecution, have asserted the national instinct and determination that there should be no combination without regulation.

It is the fashion to treat the Sherman Anti-Trust Act of 1890 as if it were sporadic, passed without knowledge or consciousness of its scope and sweep. If this means that in 1890 no one expected to see railroad and industrial corporations which had been growing in power and might for twenty-five years, since the Civil War, brought under an absolute control which has shocked European and English financial opinion by its relentless penalties, this is perfectly true; but if any one imagines that this act did not respond to and express a national purpose as wide, deep and persistent as any in our history, he misreads the record. If the Sherman act had been a mere accident, running counter to the deeper national purpose, the courts would have minimized it, as our courts have so often dealt with the legislative vagary of the day; but as all know the crucial decisions on this and like laws by courts of last resort, at Washington and elsewhere, have had the precise quality that the law (up to the decision carrying a step farther the regulation or prohibition of competition destroying combination), had been such as to leave

the court open to go either way. Uniformly, the corporation view has lost. This common action in both fields of our complex system and through the triple instrumentalities of each, never takes place and never can take place, unless something more fundamental than opinion or even law is at work—a primal national instinct.

When the National Civic Federation called its first conference on trusts in 1903, it was impossible to secure from that gathering any common action. No resolutions were passed, because the general national purpose was not yet clear. The conference which met last October at Chicago was precisely such a body as might have been expected to break up again without result. It was heterogeneous, it had no common purpose or standard, and at heart half of its members had strong personal interests, through their connection with railroads, trusts, unions, granges, commercial associations and federal and state governments. If this body reached a common conclusion, it is because the popular will is now clear as to the regulation of combination. The only error was in not seeing how universal and without exceptions their purpose was. It was generally accepted, and the committee on resolutions included men in each category mentioned, that railroad combinations could be permitted under the supervision of the Interstate Commerce Commission, that the great industrial corporations, "Trusts," must be classified, and such as affected interstate commerce so as to affect its federal regulation must pass under the supervision of the Federal Bureau of Corporations, that commercial associations, maintaining wholesale and retail discounts, must be given the common law rights vouchsafed them in the past, before the Sherman and state acts treated the protection of discounts as a restraint of trade, and that unions and granges, since they were not organized for profit, should be permitted combination in interstate commerce without regulation and supervision.

This briefly summarizes the declaration of principles adopted by the Chicago conference of 1907; but as differences existed on details, it was agreed to urge on Congress a commission to report after the presidential election, as action before such a contest could not be reasonably accepted. The result in Congress has shown that not even the pressure of President Roosevelt's administration could secure the passage of any legislation at a session from which every member of the house looked forward to his approaching election.

A commission might have been secured and would have educated the public. As it is, the measure introduced by Representative Hepburn followed the outlines of the Chicago program as drawn in a bill by the committee on legislation of the National Civic Federation, remodeled by the Federal Bureau of Corporations, considerably increasing its power, with a section intended to protect the unions and granges, one combined to protect the price of labor and the other to protect the price of farm products, from the possible consequences of the Supreme Court decision in the Danbury Hat case, though not on the labor boycott in interstate commerce.

But this section served the remarkable purpose of showing that all concerned had failed to understand how inexorable was the national determination that there should be no combination without regulation. If there has been anything taken for granted in discussion and conference on this subject by congressmen and economists, by the learned counsel of great corporations and the heads of unions, by newspapers and by federal officials from President Roosevelt down, it has been that legislation permitting combination to railroads and trusts, under adequate supervision, would pass all the easier if it relieved unions and granges from their anxieties under the Sherman act.

Nothing of the kind. The instant it became clear that the ambiguous section already noted above might free unions from the Sherman act, the measure which held it was halted. When the Supreme Court in the boycott decision held a union to exactly the same responsibility as a trust under the Sherman act, the House of Representatives could not, like the House of Commons, be brought to free the labor organization from responsibility for its acts. Representatives were overwhelmed with protests which made them, from Speaker Cannon down, clear that the law must stand as the Supreme Court left it. What every one forgot was that, while the American Federation of Labor has 2,000,000 members, there are 1,400,000 separate stores and establishments in trade, and each one of these has a stronger voting power than a single member of a union. "Organized labor" is really outvoted by commercial establishments. The practical result is that federal law, so far as it affects combinations of labor or of capital through injunctions or prosecutions, remains unchanged, though alteration was urged together by the joint efforts of labor and of capital. Small establishments, ex-

pressing and urging the national conviction that there must be no combination, not even of labor or of the farmer, without regulation, prevented all legislation, whether asked by railroad, trust, commercial association, union or grange.

Legislation is, however, inevitable. The choice to-day for combinations is no longer after the past eighteen years, since the Sherman act, between regulation or no regulation, but between regulation by criminal prosecution and regulation by administrative supervision. The first is in full operation. Every decision widens its scope. Every prosecution and conviction advertises and enforces its perils to all combinations. Ten years ago, the great corporations were opposing federal supervision. Twenty years ago, the decision in the Knight Sugar cases seemed likely to render the extension of federal power over manufacturing corporations impracticable and unconstitutional. To-day, many lawyers advising trusts would, I know, be glad if that decision were out of the way and their charge safely at anchor in the haven of federal regulation. As for the counsel of the government, the plea of Mr. Hoyt, Solicitor of the Department of Justice, sufficiently shows the belief of official legal advisers that the Supreme Court, if a path of retreat, not too patent, be opened, will silently withdraw from its position in Knight's case and lay down the wiser doctrine, that where the operations of a corporation require regulation in order efficiently to regulate interstate commerce, it must pass under Federal regulation so far as the efficient discharge of the constitutional power to regulate commerce between the states renders this necessary.

An industrial corporation, using the term in its broadest sense, of companies engaged in production, manufacture, mining or distribution, comes within the purview of federal jurisdiction through its relation to interstate commerce. This relation may arise in two ways, the corporation may be directly engaged in this commerce, or its operation may be on a scale sufficiently large to render the regulation of interstate commerce ineffectual, unless the corporation itself be under supervision. On this latter principle the federal power has already been extended to fields in themselves wholly outside of federal jurisdiction. A navigable river, like the Ohio, bed and stream, is under the sovereignty of the states it divides or through which it flows. The federal government has no such interest in either as justifies control over them, as the Supreme

Court has just held in the Colorado River case; but the regulation of interstate commerce has extended a plenary federal jurisdiction over bed and stream, as far as it is necessary to improve the navigation by condemning private property, protecting work from trespass or deciding at what price a private enterprise engaged in improving navigation can part with its title. President Monroe challenged this right in his familiar message, whose chief weight and value to-day is the measure its law and logic offers of the complete reversal by the national courts, legislature and executive of his position. Perpetually one returns at all points to the principle that whatever the federal government needs for the complete exercise of a granted power, it can take and hold and its courts, in a constantly enlarging jurisdiction, decide the boundaries of this power and the mode under which it arises.

Federal power is clear where an industrial corporation is engaged in interstate commerce; but in the application of this power to a corporation, the issue at once arises as to whether the exercise of jurisdiction is limited to its interstate commerce alone, or can be extended over the operation of the corporation as a whole. If the former cannot be exercised without the latter, the latter will follow. In the measure drawn by the National Civic Federation, it was assumed that federal regulation would extend only to interstate business. Federal law and prosecution have for eighteen years infringed upon or threatened this traffic of industrial corporations through a penal statute, the act of 1890. The principle therefore adopted in the measure proposed was of the nature of an act of provisional indemnity. If these corporations made certain reports and submitted their contracts for approval to the Bureau of Corporations, they were to be free from the operation of the Sherman Anti-Trust Act. If they failed, either in their reports or in securing the approval of this bureau, the provisions of the act revived. While an unusual proceeding in American law, the group of decisions dealing with amnesty at the close of the Civil War leaves no reasonable doubt that a discretion as to the enforcement of a penal statute, even when, as in the case of treason, it applies to a constitutional crime, can be vested by Congress in the executive officer whom it selects by appropriate legislation to exercise this discretion. But while the principle is constitutional, it has not yet commended itself either to Congress or the newspapers. The discretionary suspen-

sion of a criminal statute on certain conditions, however constitutional and however desirable in itself, is not customary.

Three classes of corporations or associations were embraced in this provision for suspending the Sherman Anti-Trust Act, railroads whose contracts were to go for approval to the Interstate Commerce Commission, corporations in trade, industrial or distributive, whose contracts were to be passed upon by the Bureau of Corporations, and labor unions and granger associations combining to maintain prices of farm products, whose contracts were to be submitted to no one. To the reference of railroad contracts to the Interstate Commerce Commission no objection was made in Congress or out, though Western dread of "pooling" has prevented any favorable action. To the approval of contracts by industrial and trading corporations or associations, the wide and general protest was made, already voiced on this platform by Mr. John Sharp Williams. To the freedom from all scrutiny of contracts affecting interstate commerce made by unions, there was an opposition no one anticipated. Instead of aiding the passage of the measure, this provision seriously increased opposition by awakening protests already touched upon.

Strictly legal in character, this framework of regulation, efficient, adequate and constitutional, satisfactory to the interests involved, protecting the public, revised and approved by President Roosevelt and his administration, still had to the journalistic eye the fatal lack that to the average man it seemed a vulgar barter of immunity to combined capital or labor, which combination, but for its provisions, would be open to criminal prosecution. This is an unfair and ignorant view; but it has to be reckoned with. The *nulli justitiam vendimus* of Magna Charta lies deep in the conscience of the English-speaking folk, and while its common and conscious opinion will accept amnesty for a political crime like treason, men gag at immunity from a criminal statute, directed against what is universally held by the average American to be morally indefensible and an offense against the higher social order —a combination in restraint of trade. Next winter, this measure comes again before Congress after the clarifying effect of a Presidential canvass. Public opinion will be better known, the insensible education of public men and of newspapers will have progressed another stage and what can and cannot be done have become more

clear. But whatever be the final outcome of the first measure which has the joint approval of capital, labor and the federal administration ever presented to solve the problem of regulating corporate combinations in capital, in farm production and labor, in and out of interstate commerce, on the borderland between state and federal jurisdiction, the bill presented by the National Civic Federation is the first mediating word on this most difficult crux of our system. It blunts no criminal weapon now possessed by the federal power, it asks of the industrial corporations chartered by states enough supervision and regulation to protect the public, but no more than the corporations are ready to concede, and it raises no dubious constitutional issue. The sole question and the chief opposition has turned upon the treatment of the labor unions, and this is solely because at one point, to wit, in contracts made by unions, it permits combination without regulation. This, I firmly believe, the American people will as little sanction for labor as for capital.

The measure of the National Civic Federation deals with the regulation of trusts on the side of and through their interstate business. This is the constitutional vinculum by which is joined federal power and the producing or manufacturing corporation, and beyond this the bill does not go. But the real cause and reason why these corporations need federal regulation is not because they are in interstate trade, but because their share in interstate commerce is so large, pervading and perturbing, that federal regulation of commerce between the states is futile and ineffectual unless they are regulated. There are tens of thousands of corporations engaged in commerce between the states which no one proposes to regulate. The measure just analyzed in theory and as a mere matter of bill-drawing, would apply to every association or corporation which sends a newspaper or ships a can of milk across a state line. In practice, no one expects that any but the large corporations, with special interests to protect, will avail themselves of its provisions. The obstacle and objection to all general measures bringing under federal regulation all corporations in interstate commerce rests on the grave inconvenience of requiring reports from the great array of small corporations, imposing an intolerable burden both on them and on the federal authority charged with their regulation, when all that is really required by public policy is the regulation of the greater corporation. The practical reason for regulating any great

industrial corporation is its disproportionate share of interstate commerce. The constitutional reason attaches to any share any corporation has in such trade, however small. No classification has yet been proposed which solves this difficulty. If the size of capital be made a basis for the regulation of a corporation, this provision can be readily evaded and its constitutional character is open to grave question. The proposal has been made by Mr. William J. Bryan, among others, that the share by any corporation of the total product of the country turned out by an industrial corporation ("trust") shall decide whether it pass under federal regulation or remain free.

As hitherto proposed, this is a mere arbitrary measure (Mr. Bryan's proposition was twenty-five per cent), for which the judicial mind has small respect in deciding the varying boundaries of constitutional jurisdiction. Classification, however, as a means and method of applying constitutional authority, the courts of last resort have always respected and accepted. This classification must not be arbitrary and evidently directed to secure a predetermined end, as the Supreme Court of Ohio held when the legislature endeavored to "classify" Cincinnati, Cleveland and Toledo on the exact basis of their population in 1900, down to a few score. If, however, the classification be natural and normal, growing out of the subject matter, if it be impartially applied without the earmarks of biased purpose—to which the courts are often blind when not forced upon them—and if a sliding scale, capable of numerical application in the future by adequate and proper authority, legislative, administrative or judicial, be provided, our courts have repeatedly accepted and generally with a favorable understanding, such classification as both a convenient and constitutional method of drawing the boundaries of jurisdiction and action.

None will question, if one corporation produced and controlled all of a great industry in the national area, so that the regulation of transportation in that industry consisted solely of the consideration of its contracts and operations, that a plea for the right of the federal authority to regulate that corporation would rest on a far firmer basis than if this product were divided between thousands of corporations, no one of which dominated the trade or was in a position wholly to deprive any railroad system of a lucrative freight by billing all its shipments over other lines. Were any one industry

wholly controlled by one corporation, it would, as every one is aware, be practically impossible to prevent rebates, rates, public in form and secret in fact, special advantages which would increase profits, inordinately low charges which stifle the cost of transportation to less highly organized industries and special privileges for the monopoly which would swiftly and secretly suppress competition. To how great an extent this is already true of the Standard Oil, recent trials have judicially established.

Given a number of leading industries, so integrated, each under a single control and all united by a community of interest, secured by the presence of members of allied financial groups on their boards of direction, and the maintenance of equal, equitable and public railroad charges would be impracticable, unless the regulating authority could also regulate, investigate and lay bare the operations of these corporations. Control of the railroads alone would not suffice to discharge the duties and responsibilities of the federal government in regulating commerce between the states. Nor would it be difficult to establish this proposition by legal evidence, cumulative and convincing.

Were Congress, acting on such evidence, to draw, as has been proposed, the arbitrary line of twenty-five per cent of the product of the country as justifying the federal regulation of a trust, it might be neither easy to establish that this was the right line nor to deal with the evasion due to keeping product just below the point at which federal regulation of industrial corporations would begin. But if Congress were to provide for classifying corporations, by dividing them between those manufacturing or producing or vending—let us say seventy-five, fifty, twenty-five and ten per cent of the total national product, graduating the severity of regulation, scrutiny, publicity and the contracts sanctioned by appropriate authority, so that publicity was greatest and the burden of regulation—as to equal prices, for instance, in all parts of the country for standard articles—heaviest on the corporation producing seventy-five per cent, this regulation decreasing as the share in the total product diminished, it is plain that the constitutional plea for such a classification would be strengthened. The courts might well hold on such legislation that Congress had a right, as a matter of public policy, to decide on the necessity for regulating industrial corporations, not directly engaged in transportation, in order effi-

ciently, adequately and equitably to discharge its duty of regulating commerce between the states, that Congress had the power to classify these corporations for this purpose in proportion as they rendered such regulation difficult by their larger share in the total product, and that this classification and the legislation provided under it could justly and constitutionally be adjusted so as to aid competition and discourage the perturbing size of these monopolies.

The machinery for such action and such a policy has already come into existence. The Census Bureau follows year by year the national product in each industry. Were the share enjoyed by each corporation or combination certified to the Bureau of Corporations, already collecting reports and having power to investigate, trusts would be classified yearly. Once classified, the Interstate Commerce Commission could be empowered to carry out the special regulation imposed on each class. The classification might admit of some evasion in passing from class to class, but all corporations large enough to derange the federal regulation of rates for transportation would be included and the multitude of lesser corporations would escape wholly the onerous regulation imposed on larger monopolies and semi-monopolies. Such a regulation would rest on the constitutional right to regulate commerce between the states. It would divide and discriminate—as is now done in the improvement of navigable and non-navigable streams—between corporations which require regulation and those which do not, because one related and the other did not to the regulation of commerce. The classification would be based on a census bureau enumeration or record of total national product and the share controlled by a combination, an enumeration which would act automatically and through a measure capable of verification, that is, of being established as any other issue of fact can be, if disputed, by a legal process. From year to year, this classification would be determined by the records and inquiry of the Bureau of Corporations. The classification of a corporation once established, it would pass under the same authority, as to its prices, contracts and operations, as the railroads, whose freight rates, its unregulated activities so certainly and injuriously derange and deflect from open, equal and just charges to all for the same transportation.

Such a system of regulation applied to all the various combinations which impinge upon the various agencies, railroad and other,

which carry on transportation between the states, would apply to each such agency as required. Each combination or corporation, whether it was mining, manufacturing or distributing, whether it represented capital or toil, the integration of an industry, the organization of labor, the maintenance of prices for agricultural products or of the margin between wholesale and retail prices, would under this plan and system be subject to a constitutional control which would leave no combination without regulation, whenever that combination was large enough to require regulation. The great multitude of lesser combinations, the multitude of lesser agreements in restraint of trade could be left to the regulation of the ordinary laws of trade and the statutory regulation of the states under the police power.

But the great combinations which to-day constitute a portent upon the national horizon would automatically pass under federal regulation. This would itself be part of that broad principle and working under our national system, which from the beginning of the American commonwealth has determined that there shall be no combination without regulation, such regulation being adapted in each case to the conditions of combined social forces, local, state and federal, each finding its appropriate governance. If the "trust" to-day awakens alarm, it is because it offers combination without regulation. Furnish this and alarm over its size will disappear. Leave it without this and the open injustice of unregulated combination will breed a challenge to the established order.

---

[NOTE.—While this paper is passing through the press, the National Republican Convention has made the Hepburn Bill a party measure by incorporating its principles in the Republican platform. The use of the criminal powers of the Sherman Act of 1890 in order to secure assent to federal supervision is made party policy; but the convention wholly refused to except trade unions from this proposed regulation. This affords a striking example, by a political body seeking votes, of the refusal to permit combination without regulation, even when this action would estrange many voters.]